FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

WINSTAR CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION AND WESTFED HOLDINGS, INC. IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION AND WESTFED HOLDINGS, INC. IN SUPPORT OF RESPONDENTS

Western Federal Savings and Loan Association (Western Federal) and WestFed Holdings, Inc. (collectively referred to as "WestFed") submit this brief as Amicus Curiae in support of respondents Winstar Corporation, United Federal Savings Bank, Statesman Savings Holding Corp., The Statesman Group, Inc. ("Statesman") and American Life and Casualty Insurance Company, and Glendale Federal Bank, FSB.

STATEMENT OF INTEREST

Western Federal was, until its seizure by federal regulators on June 4, 1993, a federal stock savings association headquarted in Marina del Rey, California, and was a wholly-owned subsidiary of WestFed Holdings, Inc. Western Federal was created on September 23, 1988 as a result of a merger with the seized Bell Savings and Loan Association ("Bell") which had been seized by federal regulators in 1985. Pursuant to the merger agreement with the government, WestFed was required to infuse $20 million in cash into Western Federal. The government purchased stock amounting to 25% of WestFed's outstanding capital shares and purchased 150,000 shares of WestFed's senior preferred stock. Western Federal was also permitted to recognize supervisory goodwill (representing Bell's negative net worth). As of the end of 1989, Western Federal's net worth was $204.4 million, with total assets of approximately $4.8 billion.

With the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989), Western Federal was ultimately unable to meet the newly enacted capital standards without reliance upon the contractually agreed upon supervisory goodwill. Western Federal was seized in June of 1993.

WestFed is one of the several cases currently pending in the United States Court of Federal Claims, three of which are represented by respondents before this Court. Amicus WestFed submits this brief in support of respondents to assist the Court's appreciation of the perspective of the saving and loan industry as to thrift mergers created prior to the enactment of FIRREA which included the recognition of supervisory goodwill and capital credits.

Thrift mergers were financial transactions, supported by mutual consideration, which were authorized, encouraged and facilitated by the Federal Home Loan Bank Board and its insurance arm, the Federal Savings and Loan Insurance Corporation (FSLIC). Thrift mergers operated to the financial benefit of the government which saved the cost of seizing and liquidating ailing thrifts. Between 1980 and 1988, regulators arranged more than 800 thrift mergers.

Amicus WestFed appreciates the magnitude of the claims currently pending on behalf of respondents and the remaining institutions in the Court of Federal Claims. However, those finite claims pale in comparison to the value of the government's word in participating in, as well as regulating, this country's $7 trillion economy. The broader principles involved in the matters before this Court dwarf the claims of merged thrifts.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "When I use a word," Humpty Dumpty said,
> in rather a scornful tone, "it means just what
> I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you
> can make words mean so many different
> things."

> "The question is," said Humpty Dumpty,
> "which is to be master — that's all."

Lewis Carroll, *Through the Looking-Glass* (Signet) at 186.

Fundamentally, the government proffers two contentions which cannot both be true simultaneously. At once, the government maintains that a sovereign will not be held to have contracted to limit its powers unless it does so in unmistakable terms, then, the government contends the sovereign always retains the right to adopt new laws regardless of their impact on prior contracts. The government thus contends it always possesses the right to redefine or repudiate its obligations, regardless of any agreements it previously solemnized. The government cannot make its words do so many different things.

The government's same arguments were made to and rejected by this Court over sixty years ago in *Perry v. United States*, 294 U.S. 330 (1935), and in *Lynch v. United States*, 292 U.S. 571 (1934), and nearly twenty years ago in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The sovereign is not the unrestrained arbiter of the meaning of its word when given in contracts with private parties. This Court has marked a distinction between the government's obligations when it enters into negotiated financial agreements, supported by mutual consideration, on the one hand, and the government's power as sovereign when passing general legislation regulating the burdens and benefits of economic life, on the other. The government has traditionally been held to its word when entering into financial agreements with private parties; the unmistakability doctrine is not a talisman preventing liability for breach of such agreements.

In the matters now before this Court, the government authorized, encouraged and contracted for mergers of healthy savings and loan associations ("thrifts") with failing thrifts as a

financially beneficial method of resolving the burgeoning problems of a troubled industry. In the 1980s, thrift mergers benefitted the government by saving billions of dollars which would have been spent in liquidating failed thrifts. Thrift mergers were negotiated transactions, authorized by Congress, extensively reviewed and expressly approved by regulators, and heavily documented by the parties and their counsel. In exchange for the infusion of private capital, the government often contributed funds (as with United Federal Savings Bank (Winstar) and Statesman Bank for Savings (Statesman)) and agreed to define "goodwill" (basically, the difference between the book value of the acquired thrift's assets and the purchase price the government negotiated) as one of the benefits of the bargain to the healthy thrift.

In late 1989 and early 1990, the government reneged on the consideration it promised for the mergers, and repudiated its contracts through the adoption and specific implementation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). Respondents and scores of other thrifts then filed breach of contract and taking claims which are currently pending in the United States Court of Federal Claims.

Amicus seeks to provide the Court with a broader perspective of the savings and loan industry, as well as the scope and nature of the over 800 thrift mergers arranged by the government between 1980 and 1988. Amicus was one of these supervisory mergers, whose transaction was completed in October 1988, less than a year before FIRREA was considered or enacted.[1] Thrift mergers were not simply realignments mandated

1. Amicus' transaction was akin to Stateman's, but went one significant step further. In Amicus' transaction, the FSLIC became one of Amicus' shareholders. Notwithstanding the government's financial interest in the
(Cont'd)

by regulators. Mergers were negotiated contracts with the government, and provided, as structured, a substantial financial benefit both to the government and to the merged thrifts. Mergers were financial agreements which the government may not repudiate at its pleasure.

Finally, the immunity from liability enjoyed by the sovereign when it enacts public and general legislation which incidentally impairs private contractual rights does not preclude respondents' claims, either because FIRREA specifically abrogated the contracts, or because the Office of Thrift Supervision (OTS), when it exercised its discretion in implementing FIRREA, did so. The sovereign acts doctrine does not sanction the specific abrogation of existing contractual rights.

ARGUMENT

I.

THRIFT MERGERS WERE NEGOTIATED TRANSACTIONS AUTHORIZED BY CONGRESS, SUPPORTED BY MUTUAL CONSIDERATION, FOR THE FINANCIAL BENEFIT OF BOTH PARTIES: THEY WERE CONTRACTS.

Throughout the 1980s, the government attempted to stem the rising tide of thrift failures through several means, one of which was to encourage healthy thrifts to merge with failing ones to avoid the higher cost of seizing and liquidating the troubled institutions. Mergers were negotiated transactions, supported by

(Cont'd)
venture, Amicus failed certain regulatory tests almost immediately after FIRREA was passed. When Amicus was finally seized in June, 1993, it had nearly $5 billion in assets.

mutual financial consideration, to induce sound thrifts — at times — to become instantly insolvent, in the hope that the combination could survive and, given enough time, prosper. The delineation of the treatment of supervisory goodwill, and the inclusion of capital credits by the government, were essential components of these agreements. Without the ability to amortize supervisory goodwill over long periods of time, the combined thrift would often have been insolvent from its inception. Such mergers would not have been approved by the regulators.

A. The Government Faced A Potentially Catastrophic Thrift Crises In The 1980s.

The collapse of the thrift industry in the 1980s represented an economic crisis recalling the specter of past emergencies faced by the government in the Great Depression and World War II. Between 1934 and 1979, 143 thrifts failed at a total cost of $290 million.[2] By 1980, the thrift industry was insolvent on a net market value basis. By 1981, 85% of the nearly 3,800 thrifts insured by the FSLIC had negative earnings.[3] "The [Federal Savings and Loan Insurance Corporation (FSLIC)] could not afford to close all the S & Ls that were failing."[4] Between 1980

2. James Barth, *The Great Savings & Loan Debacle* 32 (AEI Press 1991).

3. Thomas Romer and Barry R. Weingast, *Congress: The Genesis of the Thrift Crisis*, 2 Stan. L.&P. Rev. 37 (1990). In April of 1981, Richard T. Pratt, chairman of the Federal Home Loan Bank Board (Bank Board) warned Congress that, "[t]he average savings & loan . . . is in the red, and is living off its net worth." Richard T. Pratt, *Competition And Condition In The Financial System*, Hearings before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong. 1st Sess. 96 (April 28, 1990).

4. William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stanford Law & Policy Review (Stan. L.&P. Rev.) 102 (1990).

and 1988, over 500 thrifts failed, costing the FSLIC an estimated $78 billion.[5] As of December 1989, 281 thrifts with $93 billion in assets were in conservatorships, and another 238 institutions with $189 billion in assets were "tangible insolvent."[6]

By the end of 1987, the FSLIC itself was insolvent by $14 billion. In the next year, the FSLIC was insolvent by over $50 billion.[7] As the Congress considered FIRREA in 1989, "liabilities facing the FSLIC and American taxpayers had reached $200 billion, and now stand at over $350 billion."[8]

In the face of such a rapidly expanding crisis, Congress empowered regulators with a variety of options for dealing with failed and failing institutions. A vital alternative was to encourage and enable healthy thrifts to merge with ailing ones, in the hope of creating a stronger institution capable of staving off the mounting economic plague.

B. The Government Authorized And Encouraged Thrift Mergers As A Less Expensive Means Of Resolving Troubled Thrifts.

Between 1980 and 1989, the FSLIC took primarily five different types of actions against insolvent institutions: (1)

5. Senate Report No. 19, 101st Cong., 1st Sess. 2 (1989) (hereinafter Senate Report).

6. James Barth and Dan Brumbaugh, Jr., *The Rough Road From FIRREA To Deposit Insurance Reform*, 2 Stan. L. & P. Rev. 61 (1990).

7. H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, (House Report), (1989) *reprinted in* U.S. Code Cong. & Admin. News 87,100.

8. Thomas Romer and Berry R. Weingast, *Congress: The Genesis of the Thrift Crisis*, 2 Stan. L. & P. Rev. 38 (1990).

liquidation; (2) assisted mergers; (3) stabilization; (4) the management consignment program (MCP); and (5) supervisory mergers. Liquidations and assisted mergers, generally referred to as resolutions, involved payments by the FSLIC to depositors or to the thrift's purchasers and were meant to finally resolve the problem. Supervisory mergers (which included the recognition of supervisory goodwill) were also meant to be final and were less costly to the government because they did not involve payments by the FSLIC. Stabilization and the MCP were temporary actions which were normally followed by liquidations or mergers.[9]

The FSLIC's options were all authorized by Congress. Most basic, the FSLIC was expressly authorized to make contracts. 12 U.S.C. § 1725(c)(3) (repealed 1989). Congress also charged the FSLIC with the discretion and power to effect mergers of financially distressed thrifts with healthy thrifts "in its sole discretion and upon such terms and conditions as [it] may prescribe. . . ." 12 U.S.C. § 1729(f)(1) (repealed 1989). The FSLIC was expressly authorized to assist thrifts either by issuing promissory notes, cash contributions, or guarantees against loss by reason of a merger. 12 U.S.C. § 1729(f)(2)(A) (repealed 1989). And, Congress recognized the regulators' practice of including supervisory of goodwill in capital. 12 U.S.C. § 1730h(d) (repealed 1989) (statutory changes in thrift accounting standards shall not "affect the authority [of the FSLIC] to authorize insured institutions to utilize . . . goodwill" in meeting regulatory requirements).

In the government's triage of failing thrifts, mergers played an important role because merging thrifts almost invariably cost the government less than liquidating them. By 1982, the FSLIC's

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9. James Barth, *The Great Savings and Loan Debacle* 31 (AEI Press 1991).

average cost associated with assisted mergers was only 14% of the cost to liquidate a thrift. In contrast, the FSLIC's average cost to close an insolvent thrift between 1987 and 1990 ranged from 31% to over 40% of the institution's total assets. Supervisory mergers cost the government far less because they did not require direct financial contributions by the FSLIC. As was widely acknowledged,

> The use of goodwill under [Generally Accepted Accounting Principles] saved the federal thrift regulators a lot of money in transactions that involved the acquisition of a sick thrift by a healthy one. Any sensible healthy thrift considering the acquisition of a sick thrift . . . would look to the federal government to "fill the gap," that is, provide cash or government notes so that the asset of the sick thrift matched its liabilities. Because the government did not have sufficient resources, it filled the gap with goodwill. Such policy conserved the FSLIC's scarce cash resources, and provided the necessary incentive for healthy thrifts to acquire failing ones.

Michael S. Helfer and William Richardson, Jr., *Goodwill and Government Promises*, 2 Stan. L. & P. Rev. 118 (1990) (footnote omitted).

Consequently, in 1981, the Federal Home Loan Bank Board (Bank Board) began to publicize its decision to allow acquiring institutions to record goodwill as an intangible asset to attract buyers for the growing number of failing thrifts. *See, e.g.*, William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & P. Rev. 102

(1990). The FSLIC's treatment of thrifts reflected its recognition of the benefits of mergers. Between 1980 and 1988, the FSLIC liquidated 78 thrifts, and assigned 95 thrifts to the MCP; during the same period, it also arranged 411 assisted mergers and 333 supervisory mergers. James Barth, *The Great Savings & Loan Debacle* 32-33 (AEI Press 1991). Mergers were clearly the FSLIC's preferred disposition for a problem that continued to worsen.[10]

Now, here, the government argues that, despite its repudiation of critical terms to the mergers, respondents "sought and obtained valuable government cash and non-cash financial assistance . . .," and the "benefits of the Bank Board policy permitting them to count goodwill as capital for the period during which that policy was in effect . . . ," and provided Glenfed "access to new and potentially lucrative markets in Florida. . . ." (Brief for the Petitioner (Petitioner's Brief) 14, 42-43). The argument is myopic. It looks past the obvious fact that respondents did not obtain the essential consideration of supervisory goodwill and capital credits for which they bargained, and which made the deals economically rational. In the case of Winstar and Statesman, the bargained-for goodwill ensured their solvency. In the face of similar arguments by the government, the Tenth Circuit observed:

> The Investors argue, and the district court agreed, that no rational investor would have acquired an insolvent institution and therefore the regulatory accounting treatment was fundamental to the agreement.

10. In congressional testimony in March 1989, the Bank Board identified 578 thrifts that were likely to require future action at an estimated cost of $38 billion. James Barth, *The Great Savings and Loan Debacle* 31 (AEI Press 1991); James Barth and R. Dan Brumbaugh, Jr., *The Rough Road From FIRREA to Deposit Insurance Reform*, 2 Stan. L. & P. Rev. 61 (1990).

> We agree. [¶] The benefit the Investors expected to receive when they agreed to acquire the failing Old Security was a solvent institution that passed regulatory muster. Without that threshold condition, there was no reason to invest capital and assume liabilities; potential profits would be financially meaningless and regulatory compliance impossible.

Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp (Resolution Trust), 25 F.3d 1493, 1502 (10th Cir. 1994).

Government-encouraged thrift mergers represented a conscious, financially beneficial strategy for dealing with the savings and loan crisis in the 1980s. While thrift mergers carried the potential for mutual financial benefit both to the government and to the thrifts, thrifts only benefitted upon the realization of the supervisory goodwill and other financial contributions which the government promised to make.

C. The Recognition Of Supervisory Goodwill In Thrift Mergers Was An Essential Component Of The Contractual Consideration From The Government.

The government contends that the agreements here did not contain explicit promises by the government defining how the thrifts could treat supervisory goodwill, so that the new thrifts would not become instantly insolvent upon completion of the merger. The Federal Circuit correctly concluded that an agreement as to the treatment of supervisory goodwill was essential consideration for each contractual transaction since the transactions would not have taken place (indeed, would not have made rational sense) without it.

Each of the three mergers involved extensive documentation and approval by the FSLIC and the Bank Board itself. Supervisory Action Agreements (Glendale Federal) or Assistance Agreements (Winstar and Statesman) included integration clauses to incorporate the contemporaneous resolutions and forbearance letters from the Bank Board and the FSLIC. *See* Pet. App. 15a-19a (Glendale); 20a-22a (Statesman); 22a-24a (Winstar).

The parties' treatment of supervisory goodwill was defined by the contemporaneous rules and regulations in effect. As such, the thrifts were contractually entitled to their legitimate expectations. The principle was explained by this Court in *United States Trust Co. of New York v. New Jersey (U.S. Trust)*, 431 U.S. 1 (1976):

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' " *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-430 (1934) quoting *Von Hoffman v. City of Quincy*, 4 Wall, 535, 550 (1867). See also *Ogden v. Saunders*, 12 Wheat, at 259260, 297-298. (Opinions of Washington & Thompson, J.J.). This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached.

Id., 431 U.S. at 20, fn. 17. As acknowledged by the Federal Circuit below, in the case of Glendale:

> If the parties did not intend to use supervisory goodwill for regulatory capital purposes there would simply be no reason for the extensive negotiations and the conditions regarding its use. It is not disputed that if supervisory goodwill had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation.

Pet. App. 18a-19a. Given the central importance of supervisory goodwill, even if the government's obligations had been simply implied by the Bank Board Resolutions and the FSLIC forbearance letters, that should be held sufficient to bind the government in good faith now. In *United States v. Bostwick*, 94 U.S. 53, 66 (1876), this Court observed:

> The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.

Having entered into such detailed integrated agreements which defined the manner in which the merged thrifts could account for supervisory goodwill, the government cannot now reasonably contend that such agreements were not properly authorized, negotiated and documented. The contracts did not

call for the surrender of sovereign power, but defined how goodwill was to be treated for those specific mergers.

II.

THE GOVERNMENT IS LIABLE FOR DAMAGES WHEN IT REPUDIATES FINANCIAL AGREEMENTS TO WHICH IT IS A PARTY.

The government miscasts its primary contention as respondents' attempt to restrict the sovereign's power to regulate the thrift industry for the common good. The surrender of sovereign power in a contract, the argument goes, requires that the sovereign do so in unmistakable terms. Correctly cast, however, the real issue is whether the government is liable for breaching its contracts, at its convenience, without paying for the consequences.

Beyond doubt, when the government acts to structure and accommodate the burdens and benefits of economic life, as in regulating an industry, it is not liable for incidental interference with the private economic expectations of states or individuals with which it deals. *Bowen v. Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41 (1986); *United States v. Gaubert*, 449 U. S. 315 (1991) (regulators not liable in tort for allegedly negligently managing the operations of a thrift leading to its insolvency).

At the same time, it is beyond peradventure that when the government itself is a party to a financial agreement, it is bound by its word, as would be any private individual, and is liable for damages for breach of its word. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935); *U.S. Trust*, 431 U.S. 1 (1976).

In *Perry*, this Court discussed the limits of sovereign power when the government makes an agreement, there, in the form of government bonds:

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt, there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation."

Id., 294 U.S. at 352-353, quoting from the *Sinking Fund Cases*, 99 U.S. 700 (1878). Indeed, the principle that the government is bound by its financial agreements is as old as the government itself.

> [In a communication to the Senate of January 20, 1795, Mr. Hamilton states] "when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises

> may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it."

Perry, 294 U.S. at 351, n. 3.

Throughout our history, Congress has sought to justify breaches of financial agreements by reference to "emergencies" of all sorts. In *Perry*, the emergency was the Great Depression. So, too, in *Lynch*, the government repealed War Risk Insurance policies through passage of the Economy Act which sought to reduce government gratuities.[11] Yet, despite the economic "emergency," and regardless of the fact that the insurance policies were not entered into in order to obtain a profit, this Court observed:

> But the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidence.

Lynch, 292 U.S. at 576. *See also, De La Rama Steamship Co. v. United States*, 344 U.S. 386 (1952) (plaintiff's claim under government issued War Risk Insurance for sinking of plaintiff's ship during World War II was still viable although government repealed War Risk Insurance in 1947).

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11. The similarities between *Lynch* and the cases here deserve further note. "War Risk Insurance was devised in the hope that it would, in large measure, avoid the necessity of granting pensions." *Lynch*, 292 U.S. at 576, n. 2. This motive parallels the government's original justification for encouraging supervisory mergers, to avoid the greater cost of liquidating failed thrifts. In addition, War Risk Insurance — just as thrift regulations — was the subject of frequent amending legislation.

This Court's opinion in *U.S. Trust* is most instructive.[12] There, New York and New Jersey repealed their statutory pledge of a portion of the Port Authority of New York and New Jersey's revenues as security for repayment of Port Authority bonds. The States' justification for the repudiation was the economic emergency of rising costs from the national energy crisis. This Court held that the Contract Clause of the United States Constitution (Article I, section 10, clause 1) prevented the repudiation of the States' contractual promise given to the bond holders:

> Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. . . . Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.
>
> * * *
>
> If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

U.S. Trust, 431 U.S. at 24, 26 (footnotes omitted).

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12. Although *U.S. Trust* involved the actions of States, challenged under the Contract Clause, the same analysis applies to actions of the federal government under the Fifth Amendment. *U.S. Trust*, 431 U.S. at 26, n. 25; *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 278, n. 31.

This Court has been careful not to permit a government's invocation of "emergencies" to justify the abrogation of a government's financial agreements. *Compare U.S. Trust with Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). Nor is the fact that the context of the government's financial obligations arises in a heavily regulated industry, alone, sufficient to justify the abrogation of intangible rights. *Compare Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (despite the extensive regulation of pesticides in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), Monsanto possessed property rights to trade secret information it was required to provide the government); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (heavy regulation of the railroad industry did not preclude *Tucker Act* claims if railroads were not adequately compensated for government taking).[13]

The "unmistakability doctrine," upon which the government relies to contend that a sovereign's relinquishment of future legislative power must leave no room for doubt, was developed in the context of attempts to enjoin the sovereign's exercise of power. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993); *POSSE*; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).[14] Here,

13. This Court has never sanctioned the sentiments of William Seidman, then chairman of the FDIC: "I think most players in this game know that [the government breaking its contract is] a risk of the business. You can't rely on the government." *Seidman Suggests Nurturing Marginal Thrift Back to Health, United States League of Savings Institutions Washington Notes* 44(5): 4, 5 (February 2, 1990), quoted in Helfer & Richardson, "*Goodwill and Government Promises*," 2 Stan. L.&P. Rev. 117 (1990).

14. The Court's discussion of sovereign power in *Merrion* was in a unique context. The issue there was whether the Tribe inherently possessed the power to tax as a sovereign, not the "power" to renege on contracts where the (Cont'd)

merged thrifts do not contend that sovereign power has been contracted away; future regulations as to future mergers are not at issue. *Compare U.S. Trust*, 431 U.S. at 30, n. 28. The government may legislate, but it cannot unilaterally abrogate its own previously existing financial contractual obligations without liability for damages.

POSSE does not lead to a different result for the government. *POSSE* dealt with Congress' change in the Social Security Act which revoked the permission afforded states to withdraw from participation upon two years' notice. The Court held that Congress retained the right to change the program. As pertinent here, however, the Court also observed:

> But the "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. . . . The provision [repealing withdrawal] constituted neither a debt of the United States, see *Perry v. United States, supra*, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch v. United States, supra*. The termination clause . . . was [not] a term over which the State had any bargaining power or for which the State provided independent consideration.

POSSE, 477 U.S. at 55.

(Cont'd)
power to tax was never mentioned. *Id.*, at 138, 145 ("[P]etitioners and the dissent confuse the Tribe's role as commercial partner with its role as sovereign.").

Each of the factors identified in *POSSE* favors respondents here. Respondents negotiated and entered into contracts with the government, supported by mutual financial consideration. The Statesman merger required the government to pay $60 million. Pet. App. 9a. Respondents also provided independent consideration by infusing capital to purchase the ailing thrifts. Pet. App. 8a, 10a. And the government agreed to a definition of supervisory goodwill which permitted all three institutions to take up to forty years to amortize the goodwill. Pet. App. 8a, 9a, 10a. *POSSE* thus highlights the several factors which render the unmistakability doctrine inapplicable to the instant cases.

III.

THE SOVEREIGN ACTS DOCTRINE DOES NOT PRECLUDE RESPONDENTS' CLAIMS BECAUSE THE ABROGATION OF THE SPECIFIC CONTRACTS WAS EFFECTED BY THE ADOPTION AND IMPLEMENTATION OF PROVISIONS IN FIRREA INTENDED TO REPUDIATE THESE CONTRACTS.

The government is free to exercise its sovereign power to enact legislation for the general welfare. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). However,

> The bounds of the immunity afforded the government by the sovereign acts doctrine . . . are not limitless. The limits of this immunity are defined by the extent to which the government's failure to perform is the result of legislation targeting a class of contracts to which it is a party. If Congress enacts legislation targeted to abrogate pre-existing contract obligations the government owes to private citizens, the government may be properly sued for breach.

Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.(Resolution Trust), 25 F.3d 1493, 1501 (10th Cir. 1994) (allowing rescission).[15]

Here, the government may not invoke the sovereign acts doctrine to immunize its abrogation of respondents' contracts for two reasons. First, although on the whole FIRREA is fairly classified as public and general legislation, FIRREA also explicitly reached out and targeted thrift mergers by materially changing the provisions for supervisory goodwill. The same can be said of the comprehensive Economy Act of 1933, at issue in *Lynch*, where only thirteen words were the instigators of a breach. *Lynch*, 292 U.S. at 575. Second, the sovereign acts doctrine is inapplicable because the OTS exercised its Congressionally authorized discretion to implement FIRREA in a way which specifically abrogated supervisory goodwill contracts.

Both the Federal Circuit and the Court of Federal Claims acknowledged that the very purpose of the pertinent sections of FIRREA which eliminated the use of supervisory goodwill (12 U.S. C. §§ 1464(t)(3)(A) and (9)(B)) was to abrogate merged thrifts' rights to use supervisory goodwill as defined by their contracts. It is beyond the sovereign's power, even in enacting general legislation, to specifically abrogate private contractual

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15. Courts have not been afraid to eschew the sovereign acts doctrine in a variety of circumstances. *See Sun Oil Co. v. United States*, 572 F.2d 786 (1978) (Secretary of Interior denied permit to install platform to oil company with lease to explore outer continental shelf); *Ottinger v. United States*, 88 F. Supp. 881 (Ct. Cl. 1950) (Manpower Commission, only source of labor in designated area, failed to supply workers to contractor engaged by the government to construct a levee); *Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 221 (1948), *cert. denied*, 334 U.S. 827; *Sunswick Corp., of Del. v. United States*, 75 F. Supp. 221 (1948), *cert. denied*, 334 U.S. 827.

rights, especially when the government is a party to the contract. *Perry*, 294 U.S. at 350-54; *Lynch*, 292 U.S. at 580-583; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (Minnesota's "pension funding charge," imposing requirement of retroactive contributions for small number of employers leaving state, held invalid); *Resolution Trust*, 25 F.3d at 1501-1502.

There is little doubt that Congress knew that its adoption of the specific provisions of FIRREA concerning supervisory goodwill would abrogate the government's existing agreements. As observed by the Chair of the Subcommittee on Financial Institutions Supervision, Regulations, and Insurance in debating FIRREA, "simply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill."[16]

Second, however, this Court need not reach the issue of FIRREA's impact, alone, upon respondents' contracts. The OTS was given discretion by Congress in dealing with supervisory goodwill which the OTS promptly exercised against respondents. The sovereign acts doctrine is inapplicable when an administrative agency with discretion specifically refuses to honor existing contracts with the government. The Tenth Circuit opted for this approach in *Resolution Trust:*

> However, if within such legislative mandate Congress provides the agency with discretion in enforcement because of Congress' awareness that prior agreements

16. H.R. Rep. No. 54(I) 101st Cong., 1st Sess. 298, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 293 (statement of Reps. Annunzio, Kanjorski and Flake); *see generally*, David B. Toscano, Note, *Forbearance Agreements, Invalid Contracts For The Surrender of Sovereignty*, 92 Columbia Law Review 426, 436-438 (1992).

> would be abrogated by an abrupt change in the law, the agency would properly be held in breach of any agreements which could have been honored by the exercise of the discretion afforded them by Congress.

Resolution Trust, 25 F.3d at 1501; *see also, Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 280 n. 35 (1969).

FIRREA granted the OTS discretion to exempt thrifts for failing to meet the higher capital requirements under certain conditions. 12 U.S.C. § 1464(t)(7) (1989). In addition, the OTS was granted the authority to exempt an institution from the revised capital standards. 12 U.S.C. § 1464(t)(8) (1989). Nevertheless, the OTS not only did not exercise its discretion in favor of respondents, it even equated capital credits with supervisory goodwill, disallowing their use beyond the winnowed uses afforded to supervisory goodwill. 12 C.F.R. § 567.1(w). Hence, either FIRREA, itself, or OTS's implementation of FIRREA, expressly reneged on the essential promises in respondents' contract, rendering inapplicable the sovereign acts doctrine.

CONCLUSION

> And be these juggling fiends no more believed,
>
> That palter with us in a double sense;
>
> That keep the word of promise to our ear
>
> And break it to our hope.

Wm. Shakespeare, *Macbeth*, Act V, Scene. 8.

Amicus submits that the judgment of the Federal Circuit Court of Appeals should be *affirmed.*

Respectfully submitted,

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